

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Newport News Division**

|  |   |                          |
|--|---|--------------------------|
| <b>D&amp;D FOODMART AND GAS, INC.,</b>   | ) |                          |
|  | ) |                          |
| <b>Plaintiff,</b>                        | ) |                          |
|  | ) |                          |
| <b>v.</b>                                | ) | <b>Case No. 4:06cv27</b> |
|  | ) |                          |
| <b>SMO, INC.,</b>                        | ) |                          |
|  | ) |                          |
| <b>Defendant.</b>                        | ) |                          |
| <hr style="border: 0.5px solid black;"/> |   |                          |
|  | ) |                          |
| <b>DMS GAS AND FOODMARTS, INC.,</b>      | ) |                          |
|  | ) |                          |
| <b>Plaintiff,</b>                        | ) |                          |
|  | ) |                          |
| <b>v.</b>                                | ) | <b>Case No. 4:06cv28</b> |
|  | ) |                          |
| <b>SMO, INC.,</b>                        | ) |                          |
|  | ) |                          |
| <b>Defendant.</b>                        | ) |                          |
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**OPINION & ORDER**

This matter is before the Court on two motions. First, Defendant’s “Motion for Leave to Supplement Answer Pursuant to F[ed]. R. C[iv]. P. 13(e) and 15(a)” (“Defendant’s Motion to Supplement”), filed March 10, 2006. (Docs. 6 & 7.) Second, Plaintiff’s “Motion for Leave to Amend Complaints and Motion to Supplement Plaintiff’s Memorandum in Opposition to Defendant’s [‘]Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment[’]” (“Plaintiff’s Motion”), filed May 1, 2006. (Doc. 15.)

The Court held a hearing on these motions on May 23, 2006, and ruled from the bench. This Order reflects the Court’s rulings. For the following reasons, Defendant’s Motion to

Supplement is **GRANTED** and Plaintiff's Motion is **GRANTED**, on the conditions that Plaintiff provide Defendant with exhibits omitted in error and that Defendant shall have five (5) days to file a supplementary response to Plaintiff's surrebuttal brief regarding Defendant's Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment.

### **I. Defendant's Motion to Supplement.**

Defendant's Motion to Supplement was filed with the Court on March 10, 2006. (Docs. 6 & 7.) Defendant originally filed an Answer that did not include a counterclaim on February 15, 2006. (Doc. 3.) Defendant alleges that its counter-claim against Plaintiff DMS Gas & Foodmarts, Inc. matured after Defendant served its Answer and that an order granting leave to amend its Answer will not unduly prejudice Plaintiff or delay these proceedings. (Doc. 6.) On March 30, 2006, before the Court ruled on Defendant's Motion, Plaintiff answered Defendant's counter-claim. (Doc. 8.)

The Court may permit a supplemental pleading "upon reasonable notice and upon such terms as are just." Fed. R. Civ. P. 15(d). The supplemental pleading must "set[] forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." Id. See also Fed. R. Civ. P. 13(e) ("A claim which either matured or was acquired by the pleader after serving a pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.").

Defendant identifies the termination of Plaintiff's lease on February 21, 2006, six days after Plaintiff filed its case, as the event prompting Defendant's Motion to Supplement. (Doc. 7 p.3.) Termination of the lease forms the basis of Defendant's Breach of Contract counterclaim. Id. at pp.1-2, Ex. A p.8.

Because granting Defendant's Motion to Supplement would not prejudice Plaintiff, who has already filed an Answer to Defendant's Counterclaim (Doc. 8), and would not otherwise be an injustice, Defendant's Motion to Supplement is hereby **GRANTED**.

The Clerk is **REQUESTED** to file Defendant's Amended Answer. (Doc. 7, Ex. A.)

## **II. Plaintiff's Motion.**

Plaintiff's Motion was filed May 1, 2006. (Doc. 15.) Plaintiff seeks the Court's leave (1) to amend Plaintiff's Complaint and (2) to supplement Plaintiff's Memorandum in Opposition to Defendant's "Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment" ("Defendant's Motion"). (Doc. 15.)

### **A. Leave to Amend Plaintiff's Complaint.**

Plaintiff has not yet amended its Complaint as a matter of course and asks leave to add two paragraphs to its Complaint. Although Defendant has already answered Plaintiff's Complaint (Doc. 3), Defendant's reply does not object to the amending of Plaintiff's Complaint. (Doc 18, p.2); see Fed. R. Civ. P. 15(a) (allowing amendment in such a situation by written consent of the adverse party). Accordingly, Plaintiff's Motion, insofar as it seeks leave to amend Plaintiff's Complaint, is hereby **GRANTED**.

The Clerk is **REQUESTED** to file the Amended Complaint attached to Plaintiff's Motion. (Doc. 15 Ex. A.)

### **B. Leave to File Surrebuttal Brief Regarding Defendant's Motion.**

Defendant's Motion was filed on March 31, 2006, with a brief in support. (Docs. 9 & 10.) Plaintiff filed a reply to Defendant's Motion on April 14, 2006. (Doc. 13.) Defendant filed a rebuttal to Plaintiff's reply brief on April 20, 2006. (Doc. 14.) The hearing on Defendant's

Motion is set for June 6, 2006. Defendant filed a Notice of Hearing on May 3, 2006. (Doc. 17.) Plaintiff's Motion was filed on May 1, 2006. (Doc. 15.) The standard for supplemental pleadings is discussed above.

Plaintiff's Motion seeks leave to file a surrebuttal to Defendant's rebuttal brief. It does not purport to be based on new information unavailable to Plaintiff at the time of its prior filing; it does not identify "transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented," pursuant to Fed. R. Civ. P. 15(d); nor does it offer any justification for not raising the points therein in Plaintiff's reply brief. Id.

While the Court disfavors such supplements, the Court is mindful that the Federal Rules of Civil Procedure encourage liberal amendment and supplementing of pleadings. Therefore, Plaintiff's Motion is hereby **GRANTED** on the following conditions: (1) Plaintiff must immediately provide Defendant with five exhibits omitted in error from the declaration of Narendra Singh, President of D & D Foodmart & Gas, Inc. and DMS Gas & Foodmarts, Inc.; and (2) Defendant shall have five days from the May 23, 2006, hearing in which to file a supplementary response to Plaintiff's surrebuttal brief, which may include additional affidavits or documentation considered necessary by the Defendant.

The Clerk is **REQUESTED** to mark Plaintiff's Motion (Doc. 15) as Plaintiff's Surrebuttal to Defendant's Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment.

### **III. Conclusion.**

For the above reasons, Defendant's Motion to Supplement is **GRANTED** and Plaintiff's Motion is **GRANTED**, under the conditions described above.

The Clerk is **REQUESTED** to file Defendant's Amended Answer. (Doc. 7, Ex. A.)

The Clerk is further **REQUESTED** to file the Amended Complaint attached to Plaintiff's Motion. (Doc. 15 Ex. A.)

The Clerk is further **REQUESTED** to mark Plaintiff's Motion (Doc. 15) as Plaintiff's Surrebuttal to Defendant's Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment.

The Clerk is further **REQUESTED** to mail a copy of this Order to counsel of record.

It is so Ordered.

\_\_\_\_\_  
/s/

HENRY COKE MORGAN, JR.  
UNITED STATES SENIOR DISTRICT JUDGE

Norfolk, Virginia  
May 30, 2006